August 11, 2005

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2005-10 is available for public comments under this procedure. It was requested by counsel, Judith L. Corley and Brian G. Svoboda on behalf of Representative Howard L. Berman and Representative John T. Doolittle.

Proposed Advisory Opinion 2005-10 is scheduled to be on the Commission's agenda for its public meeting of Thursday, August 18, 2005.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on August 17, 2005.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2005-10, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 11, 2005

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Brad C. Deutsch
Assistant General Counsel

Amy L. Rothstein
Attorney

Albert J. Kiss
Attorney

Subject: Draft AO 2005-10

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 18, 2005.

Attachment

ADVISORY OPINION 2005-10 **DRAFT**

Judith L. Corley, Esq.
Brian G. Svoboda, Esq.
Perkins Coie LLP
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011

Dear Ms. Corley and Mr. Svoboda:

We are responding to your advisory opinion request on behalf of United States Representatives Howard L. Berman and John T. Doolittle, concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to fundraising activities by Representatives Berman and Doolittle for independent ballot measure committees that support or oppose initiatives on the November 8, 2005, California statewide special election ballot.

The Commission concludes that Representatives Berman and Doolittle may raise funds for these ballot measure committees, subject to the Act's amount limitations and source prohibitions, and consistent with State law.

Background

The facts of this request are presented in your letter dated June 24, 2005, and in your e-mail communication dated July 15, 2005.

Representatives Berman and Doolittle are United States Representatives from California. They are also candidates for re-election to the House of Representatives in 2006 and holders of Federal office under the Act and Commission regulations. *See* 2 U.S.C. 431(2) and (3); 11 CFR 100.3 and 100.4.

A statewide special election will take place on November 8, 2005, that will present several ballot initiatives to California voters. The deadline for a ballot initiative to qualify for

the special election was June 30, 2005. Neither Representative Berman nor Representative Doolittle, nor any other candidates for Federal office, will be on the November 8, 2005, ballot.

The ballot initiatives represent major issues facing the constituents of Representatives Berman and Doolittle, and touch on matters frequently before Congress. Accordingly, Representatives Berman and Doolittle would like to undertake certain activities to support or oppose certain ballot initiatives.

Specifically, Representatives Berman and Doolittle propose to raise funds for ballot measure committees that have been formed solely to support or oppose the initiatives on the November 8, 2005, ballot.[1] The ballot measure committees are not and would not be directly or indirectly established, financed, maintained or controlled by either Representative Berman or Representative Doolittle, or by anyone acting on their behalf, or by a national, State, district or local committee of a political party. Representatives Berman and Doolittle would undertake fundraising in their individual capacities, and not on behalf of any political party committee. They would not raise funds for any public communications that would refer to either of them and that would be distributed in their respective congressional districts.

Question Presented

Do the Act's amount limitations and source prohibitions apply to Representatives Berman and Doolittle when they raise funds for ballot measure committees formed solely to support or oppose ballot initiatives on the California special election ballot, where the ballot measure committees are not directly or indirectly established, financed, maintained or controlled by either Representative Berman or Representative Doolittle or by anyone acting on their behalf, or by any political party committee?

Legal Analysis and Conclusions

Yes, the amount limitations and source prohibitions of the Act apply to Representatives Berman and Doolittle when they raise funds in the circumstances that you describe. Thus, although Representatives Berman and Doolittle may raise funds for State ballot measure committees, they may do so only in amounts that are not in excess of the Act's limitations, that are from sources permissible under the Act, and that are consistent with State law.

As amended by the Bipartisan Campaign Reform Act of 2002, Public Law 107-155, 116 Stat. 81 (2002) ("BCRA"), the Act regulates certain activities of Federal candidates and officeholders when they raise or spend funds in connection with non-Federal elections. *See* 2 U.S.C. 441i(e)(1)(B); *see also* 11 CFR 300.60 and 300.62. Specifically, under the Act and Commission regulations, Federal candidates and officeholders may not raise or spend funds in connection with any non-Federal election unless the funds do not exceed the amounts permitted with respect to contributions to candidates and political committees under 2 U.S.C. 441a(a)(1), (2), and (3), and do not come from sources prohibited under the Act.[2] *See* 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. Commission regulations also require such funds to be in amounts and from sources that are consistent with State law. *See* 11 CFR 300.62.

The aim of 2 U.S.C. 441i(e)(1)(B) is to limit the ability of Federal candidates and officeholders to raise and spend soft money in connection with State and local elections, but not to eliminate the activity entirely. *See* Advisory Opinion 2005-2 and *McConnell v. Federal*

[1] Although not directly stated in your request, the Commission assumes that the ballot measure committees are not political committees under the Act.
[2] Prohibited sources include corporations, labor organizations, national banks, foreign nationals, and government contractors. *See* 2 U.S.C. 441b, 441c, and 441e.

Election Commission, 540 U.S. 93 (2003) ("*McConnell*") at 182.[3] Unlike other sections of the Act specifically dependent upon the appearance of a Federal candidate on the ballot (*see, e.g.*, 2 U.S.C. 431(20)(A)(i) and (ii)), the limitations and prohibitions in 2 U.S.C 441i(e)(1)(B) apply to a Federal candidate or officeholder at any time, regardless of whether any Federal candidate appears on the ballot for the relevant election. *See* Advisory Opinion 2005-2.

In addition, the Commission has previously determined that the scope of section 441i(e)(1)(B) is not limited to elections for political office, but also includes elections involving ballot initiatives. In Advisory Opinion 2003-12, the Commission examined whether the activities of a State ballot measure committee, and the activities of a Federal officeholder to raise funds for the ballot measure committee, were "in connection with any election other than an election for Federal office" under section 441i(e)(1)(B). The Commission found that the Act's general definition of "election," which defines the term to include "a general, special, primary or runoff election," did not resolve the question, because "the interpretation of the scope of section 441i(e)(1)(B) should not depend on one word in isolation." Advisory Opinion 2003-12 and 2 U.S.C. 431(1)(A). The Commission contrasted the sweeping language used by Congress in section 441i(e)(1)(B) ("any election other than an election to Federal office") with the wording in other provisions of the Act, such as section 441b(a), which

[3] In upholding BCRA, the Supreme Court observed in *McConnell* that BCRA's fidelity to preserving the integrity of the electoral process and preventing corruption sets it apart from certain other statutes that the Court had previously found to be constitutionally infirm, such as those at issue in *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (Supreme Court struck down a State statute prohibiting corporate speech pertaining to state ballot measures) and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (Supreme Court struck down a State statute banning the distribution of anonymous campaign literature). *McConnell* at 206, n.88. More specifically, with respect to the restrictions contained in 2 U.S.C. 441i(e)(1)(B), the Supreme Court stated in *McConnell* that:

> Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself.

McConnell at 182.

prohibits certain contributions and expenditures "in connection with any election *to any political office*." 2 U.S.C. 441b(a) (emphasis added). Observing that, "[w]here Congress uses different terms, it must be presumed that it means different things," the Commission concluded that the scope of section 441i(e)(1)(B) is not limited to elections for a political office.[4] Advisory Opinion 2003-12 (footnote omitted).

In your advisory opinion request, you note that the discussion of activities by ballot measure committees in Advisory Opinion 2003-12 distinguished those ballot measure committees that were established, financed, maintained or controlled by a Federal candidate or officeholder, from those that were not. In that advisory opinion, the Commission concluded that all activities of a ballot measure committee that is directly or indirectly established, financed, maintained or controlled by a Federal candidate or officeholder are in connection with an election other than an election for Federal office under section 441i(e)(1)(B) of the Act but that the activities of a ballot measure committee that is *not* directly or indirectly established, financed, maintained or controlled by a Federal candidate or officeholder are in connection with an election other than an election for Federal office only after the committee qualifies an

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[4] The Commission's pre-BCRA advisory opinions, finding that "contributions" or "expenditures" relating exclusively to ballot initiatives are not in connection with an election, are not to the contrary. Advisory Opinion 1989-32 involved interpretation of 2 U.S.C. 441e, which then limited activity "in connection with an election to any political office." Advisory Opinions 1984-62, n.2, 1982-10, and 1980-95 interpreted 2 U.S.C. 441b(a), which also includes the "in connection with any election to any political office" language.

initiative or referendum for the ballot.[5] In the instant inquiry, the fundraising activities by Representatives Berman and Doolittle would be for ballot measure committees after the deadline to qualify ballot initiatives for the November 8, 2005, special election has already passed. Accordingly, such activities are "in connection with an[] election other than an election for Federal office," irrespective of whether either Representative Berman or Representative Doolittle has directly or indirectly established, financed, maintained or controlled any of the committees.

Because the proposed fundraising activities of Representatives Berman and Doolittle in connection with the November 8, 2005, special election are "in connection with an[] election other than an election for Federal office" under section 441i(e)(1)(B) of the Act, Representatives Berman and Doolittle may raise and spend funds in connection with the November 8, 2005, special election only if the funds comply with the amount limitations and source prohibitions of the Act. Specifically, Representatives Berman and Doolittle may each raise up to $5,000 per calendar year from permissible sources for each ballot measure committee. *See* 2 U.S.C. 441a(a)(1)(C) and 441i(e)(1)(B); 11 CFR 110.1(d) and 300.62. In addition, Representatives Berman and Doolittle may raise funds in connection with the ballot initiatives only in amounts and from sources that are consistent with State law. *See* 11 CFR 300.62.

The advisory opinion request does not indicate the status of any of the ballot measure committees in question under the Internal Revenue Code. If, however, Representatives Berman

[5] The Commission has determined that an organization will not be treated as an entity directly or indirectly "established, financed, maintained or controlled by" a candidate or Federal officeholder solely because the candidate or Federal officeholder attends fundraising events and/or participates in fundraising activities to some extent. *See* Advisory Opinion 2003-12. A different result may occur, however, if the candidate or Federal officeholder is the source of such a significant amount of funds for the organization that the candidate or Federal

and Doolittle seek to solicit funds for a ballot measure committee that is an organization described in section 501(c) of the Internal Revenue Code and exempt from taxation under section 501(a) of the Internal Revenue Code or that has submitted an application for determination of tax exempt status, then the "general solicitation" or "specific solicitation" provisions of the Act and Commission regulations may apply. *See* 2 U.S.C. 441i(e)(4)(A) and (B), 11 CFR 300.65, and Advisory Opinion 2003-12. "General solicitations" are not subject to the Act's amount limitations or source prohibitions, whereas "specific solicitations" are limited to amounts not to exceed $20,000 from any individual in any calendar year. *See* 2 U.S.C. 441i(e)(4)(A) and (B); 11 CFR 300.65(a) and (b). The general solicitation and specific solicitation provisions of 2 U.S.C. 441i(e)(4) do not extend to section 527 political organizations or to any other entities that are not described in section 501(c) of the Internal Revenue Code. Because your advisory opinion request does not provide any details about the content of the proposed solicitations by Representatives Berman and Doolittle, the Commission is unable to determine whether any of the solicitations might qualify as "general" or "specific" under 2 U.S.C. 441i(e)(4).

The Commission expresses no opinion regarding the application of State law or the Internal Revenue Code to the proposed activities, because those questions are not within the Commission's jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in

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officeholder is effectively financing the organization. *See* 11 CFR 300.2(c)(2) and Advisory Opinion 2003-12,

this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

Scott E. Thomas
Chairman

Enclosures (Advisory Opinions 2005-2, 2003-12, 1989-32, 1984-62, 1982-10, and 1980-95)

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n.17.